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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

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CHARLOTTE E. NEUBAUER,
personally and as personal
representative of the Estate
of Clifford S. Neubauer, et al.,

Petitioners,

v.

OWENS-CORNING FIBERGLAS CORP.,
et al.,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTION PRESENTED

Does the Court of Appeals' interpretation of the Wisconsin statute of limitations as to the time of accrual of a cause of action for asbestos-caused disease deprive the petitioners of a remedy for a wrong and deprive them of due process of law?

## LIST OF PARTIES

The following is a list of all parties to the proceeding in the Court of Appeals:

Plaintiffs-Appellees-Cross-Appellants

Charlotte E. Neubauer, personally and as personal representative of the Estate of Clifford S. Neubauer

Joy Skofronick, personally and as personal representative of the Estate of Clifford E. Mason

Walter J. Presechnik

Clarence O. Reimer and Mary M. Reimer

Darwin Frank Witkowski, Sr., and Eleanore Witkowski

Clarence P. Lillge and Hertha E. Lillge

Erich E. Eckholdt and Mamie Eckoldt

Robert J. Gaynor and Lavellette Gaynor

William Globig and Kathrine A. Globig

Robert A. Wetzel and Grace M. Wetzel

Defendants-Appellants-Cross-Appellees

Johns-Manville Sales Company

Owens-Corning Fiberglas Corp.

Transcontinental Insurance Co.

Third-Party Defendants-Appellants-
Cross-Appellees

Owens-Illinois, Inc.

Pittsburgh Corning Corp.

Keene Corporation

Eagle-Picher Industries, Inc.

Jim Walter Corp.

Celotex Corp.

Fibreboard Corp.

GAF Corp.

Atlas Asbestos Co.

H. K. Porter Co., Inc.

Southern Asbestos Company

Forty-Eight Insulations, Inc.

Standard Asbestos Manufacturing and
Insulating Co.

Unarco Industries, Inc.

Armstrong Cork Co.

Rock Wool Manufacturing Co.

Certain-Teed Products Corp.

Turner-Newall, Ltd.

Nicolet, Inc.

Raybestos Manhattan, Inc.

Ryder Industries, Inc.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## OPINIONS BELOW

The opinion of the Court of Appeals is reported as Neubauer v. Owens-Corning Fiberglas Corp., 686 F.2d 570 (7th Cir. 1982). It is reproduced as Appendix A, pp. 1A-30A, infra. The opinion of the District Court is reported as Neubauer v. Owens-Corning Fiberglas Corp., 504 F.Supp. 1210 (E.D. Wis. 1981). It is

reproduced as Appendix B, pp. 31A-50A, infra.

## JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1982. A timely petition for rehearing was denied on September 16, 1982. (Appendix C, pp. 51A-52A, infra. This Court has jurisdiction under 28 U.S.C. §1254(1).

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves sections 893.14 and 893.205(1) of the Wisconsin Statutes (1977); Amendments V and XIV to the United States Constitution; and Article I, section 9 of the Wisconsin Constitution.

Section 893.14, Wis. Stats. 1977:

> "893.14 Actions, time for commencing. The following actions must be commenced within the periods respectively hereinafter prescribed after the cause of action has accrued except that the period shall not be considered to have expired when the court before which the action is pending shall be satis-

fied that the person originally served knowingly gave false information to the officer with intent to mislead him in the performance of his duty in the service of any summons or civil process. In the event the court so finds the period of limitation shall be extended for one year."

Section 893.205, Wis. Stats. 1977:

"893.205 Within 3 years. Within 3 years:

"(1) An action to recover damages for injuries to the person for such injuries sustained on and after July 1, 1955, unless notice in writing as provided in s. 330.19(5), 1955 statutes, was served prior to July 1, 1959, in which event s. 330.19(5), 1955 statutes, shall apply. But no action to recover damages for injuries to the person, received without this state, shall be brought in any court in this state when such action is barred by any statute of limitations of actions of the state or country in which such injury was received unless the person so injured shall, at the time of such injury, have been a resident of this state.

"(2) An action brought to recover damages for death caused by the wrongful act, neglect or default of another where death resulted on or after July 1, 1955.

"(3) Any civil action arising under ch. 11 or subch. III of ch. 13."

Article V of the Amendments to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article XIV of the Amendments to the United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, section 9 of the Wisconsin

Constitution:

> "Remedy for wrongs. SECTION 9. Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without denial, promptly and without delay, comformably to the laws."

## STATEMENT OF THE CASE

### I. Statement of Facts

The plaintiffs or decedents in each of these products liability cases were insulation workers by trade whose employment involved the use of asbestos-containing thermal insulation products. Suits were brought against several asbestos insulation manufacturers seeking damages for injuries or death allegedly resulting from exposure to such asbestos insulating products. All actions were consolidated for pre-trial purposes by the District Court on December 4, 1979.

In the wrongful death actions of

Neubauer and Skofronick, the plaintiffs claim that death resulted from a form of cancer known as mesothelioma which is alleged to be caused by exposure to asbestos fibers. In the remaining eight actions, the alleged injury is asbestosis, a lung disease which involves fibrosis of the lungs, pleural thickening, pleural plaques and shortness of breath.

A. Facts Pertinent To The Claim Of Joy Skofronick

The action of Joy Mason Skofronick was commenced by service of a Summons and Complaint filed on July 15, 1977, in which she seeks to recover for the wrongful death of Clifford Mason, as well as damages for his conscious pain and suffering and hospital and medical expenses. She alleges that her husband died of cancer contracted as the result of exposure to asbestos. In June of 1974, the decedent developed belching, burping, epigastric distress and abdominal

bloating as the result of abdominal cancer. He died on September 28, 1974.

The decedent, Clifford E. Mason, was not informed that he had a disease arising from exposure to asbestos fiber prior to July 16, 1974. He was advised that he had no significant abnormalities prior to that time.

B. Facts Pertinent To The Claim Of Walter J. Presechnik

The action of Walter Presechnik was commenced by service of a Summons and Complaint dated August 2, 1977.

Mr. Presechnik's lung problems go back to the 1950's as evidenced by a radiologist's report of January 31, 1964, which states he had bilateral pulmonary fibrosis since 1957. Dr. Nathan Grossman testified on October 6, 1980, that bilateral pulmonary fibrosis is a phrase used by doctors reporting on patients that have asbestosis and that the bilateral pulmonary fibrosis was caused by exposure to

asbestos. Mr. Presechnik also had a tendency to develop pneumonia and had swelling of the ankles in 1970, both of which are characteristic of people suffering from asbestosis.

Dr. Donald Schleuter, a pulmonary function specialist, reviewed the medical records of Walter Presechnik and it is his opinion that the plaintiff had asbestosis for several years prior to November 19, 1974, the date asbestosis was diagnosed by Dr. Bindschalder.

Walter J. Presechnik did not have symptoms or complaints due to asbestosis prior to August 2, 1974.

C. Facts Pertinent To The Claim Of Clarence O. Reimer

Clarence Reimer's action was commenced on June 2, 1977, by the filing and service of a Summons and Complaint.

Mr. Reimer was examined by Dr. Nathan Grossman on November 16, 1974, and the office records of the examination show that he had

severe asbestosis as of that date. Dr. Grossman traced the history of asbestosis during his deposition of October 6, 1980, and stated that it would have existed for a minimum of ten years and for as long as twenty years before the disease would reach the stage seen in Mr. Reimer in 1974.

A pulmonary function specialist, Dr. Donald Schleuter, reviewed the medical records of Mr. Reimer and agreed with Dr. Grossman that the plaintiff had asbestosis for several years prior to November 16, 1974.

Clarence O. Reimer had no symptoms, complaints or disability relative to his lungs, his physical being, his endurance or capacity to do his work prior to June 2, 1974. He was not informed or knew that he had asbestosis until November 16, 1974. He first became aware of a deficiency in his physical condition in October, 1974. There had been no prior examinations resulting in medical records of any symptoms or lung changes prior to October, 1974.

D. Facts Pertinent To The Claim Of Darwin Frank Witkowski

Darwin Frank Witkowski's action was commenced by the service of a Summons and Complaint dated and filed January 25, 1978.

Mr. Witkowski was treated in 1974 by Dr. David C. Mountain, deceased, whose practice was subsequently taken over by Dr. Kanak K. Shah. Dr. Shah was deposed on October 6, 1980, and testified that based on his review of Dr. Mountain's records and his own examination and treatment of Mr. Witkowski, the plaintiff had asbestosis as of June 27, 1974.

An examination was also conducted by Dr. Mountain on August 19, 1974, and the records show a diagnosis of asbestosis. As a result of that examination, a statement was sent to CNA Insurance Company on August 26, 1974, conveying the diagnosis of pulmonary fibrosis, which his doctor explained in Mr. Witkowski's case means asbestosis.

Darwin Frank Witkowski had no symptoms,

complaints or disability relative to his lungs, his physical being, his endurance or capacity to do his work prior to January 25, 1975. He had no respiratory symptoms until 1976.

E. Facts Pertinent To The Claim Of Clarence Lillge

Clarence Lillge commenced his action by service of a Summons and Complaint dated January 25, 1978.

On April 22, 1975, Mr. Lillge was examined by Dr. Nathan Grossman as a routine OSHA examination of asbestos workers, and it was found that there was progression of the asbestosis which he had on June 31, 1969. The basis for this diagnosis was chest x-rays taken of Lillge on June 31, 1969, which showed pleural calcification involving the right and left walls which is an indication of asbestosis.

Clarence P. Lillge had no symptoms, complaints or disability relative to his lungs, his physical being, endurance or capacity to

work prior to January 25, 1975. He was not informed and did not know that he had asbestosis until November 19, 1976. He first noticed remarkable tiredness approximately one year prior to May 31, 1976.

F. Facts Pertinent To The Claim Of Erich Eckoldt

Erich Eckoldt's action was commenced by the service of a Summons and Complaint which was filed March 3, 1978.

On February 9, 1974, Mr. Eckoldt was examined by Dr. Nathan Grossman during which a lung dysfunction study was conducted. Mr. Eckoldt did not fully cooperate in the study, and Dr. Grossman was unable to determine the extent of dysfunction; however, chest x-rays showed a thickened pleura on the left lateral chest and pleural paracardial adhesion at the mid-portion of the left ventricle. Based upon these findings and the history given by Mr. Eckoldt, Dr. Grossman testified on October 6, 1980, that Erich Eckoldt had

asbestosis on February 9, 1974.

Additionally, Mr. Eckoldt complained of shortness of breath in 1974, and Dr. Grossman testified that exposure to asbestos fibers was a major consideration with regard to that problem.

Erich E. Eckoldt did not have any symptoms, complaints or disability relative to his lungs, physical being, endurance or capacity to work due to asbestosis until approximately November, 1977. He was not informed and did not know he had asbestosis until November 11, 1977.

G. Facts Pertinent To The Claim Of Robert Gaynor

The action of Robert Gaynor was commenced by service of a Summons and Complaint dated August 18, 1978.

On June 15, 1974, a lung dysfunction study was conducted of Mr. Gaynor by Dr. Nathan Grossman. That study found his forced vital capacity was 63% of the pre-

dicted value, the forced expiratory volume 68% of the predicted value, and the forced expiratory flow 83% of the predicted value. A radiographic exam revealed type T irregular small opacities involving at least the lower two-thirds on the left side and almost three zones on the right side. It also showed pleural plaques on the right and left sides and calcification in both diaphragms.

Dr. Grossman testified at a deposition on October 6, 1980, that Robert Gaynor suffered from severe asbestosis as of June 15, 1974, and that the results of the lung dysfunction study were not inconsistent with such diagnosis.

Robert Gaynor had no conscious symptoms, complaints or disability relative to his lungs, his physical being, his endurance or capacity to do his work prior to August 18, 1975, that was associated with or related to contact with asbestos fiber. He first became aware of any deficiency in his physical condition on October 25, 1975.

H. Facts Pertinent To The Claim Of William Globig

William Globig's action was commenced by service of a Summons and Complaint dated February 16, 1979.

Mr. Globig was seen by Dr. Nathan Grossman on May 14, 1975, at which time a lung dysfunction study was conducted. The study showed Globig's forced vital capacity to be 78% of the predicted value, the forced expiratory flow was 83% of the predicted value and the forced expiratory volume as 85% of the predicted value. Dr. Grossman also found thickening of the pleura on the left side which was caused by his exposure to asbestos.

At a deposition on October 6, 1980, Dr. Grossman testified that William Globig had asbestosis as of May 14, 1975.

William Globig had no symptoms, complaints, or disability relative to his lungs, his physical being, his endurance or capacity to do his work prior to February 16, 1976.

He was not informed and did not know he had asbestosis until 1977. He first became aware of a deficiency in his physical condition on July 11, 1978.

## I. Facts Pertinent To The Claim Of Robert Wetzel

Robert A. Wetzel commenced his action by the filing of a Summons and Complaint dated November 19, 1979.

Mr. Wetzel was examined by Dr. Nathan Grossman on June 8, 1974, as part of a regular series of examinations required by OSHA of asbestos insulation workers. A lung dysfunction study was performed at that time which revealed Mr. Wetzel's forced vital capacity to be 76% of the predicted value, the forced expiratory volume was 78% of the perdicted value, and his forced expiratory flow was 81% of the predicted value. X-rays taken that day showed a triangular area of fibrosis involving the right mid lung field, an air bronchogram above the

triangular shadow and a right pleural plaque.

Dr. Grossman was deposed on October 6, 1980, and testified that Robert Wetzel was diagnosed as having asbestosis on June 8, 1974, and further, there was lung dysfunction consistent with the diagnosis of asbestosis as of that date.

Robert A. Wetzel never had any symptoms, complaints or disability relative to his lungs, his physical being, his endurance or capacity to work associated with asbestosis until just prior to October 6, 1979. He was never informed and did not know he had asbestosis until November 10, 1979.

II. The Proceedings in the Trial Court

The District Court had jurisdiction of these cases under 28 U.S.C. §1332.

All of the defendants and third-party defendants moved the District Court for summary judgment in each of the actions, with the exception of the Neubauer case, on the grounds that the actions were barred by

the Wisconsin statute of limitations. On January 9, 1981, the District Court, in a written decision, denied all of the motions for summary judgment. In its decision, the District Court, applying Wisconsin law, ruled that the statute of limitations in cases of this nature begins to run on the date of the injured person's last exposure to the disease-causing substance. The motions for summary judgment were denied because none of the parties addressed themselves to the question of the date of the last exposure.

On April 6, 1981, the District Court certified its decision and order for appeal, pursuant to 28 U.S.C. §1292(b).

All parties petitioned the Court of Appeals for permission to appeal, and such permission was granted on June 3, 1981. (Appendix D, pp. 53A-56A, infra.)

III. The Proceedings in the Court of Appeals.

The United States Court of Appeals for the Seventh Circuit held that a cause of

action for asbestos-caused disease accrues, and the Wisconsin statute of limitations begins to run, when the disease becomes medically diagnosable without regard for any noticeable impairment to the plaintiff. Since the plaintiffs in each of these cases had a diagnosable disease more than three years before they brought suit, the Court remanded these cases to the District Court for further proceedings.

## REASONS FOR GRANTING THE WRIT

### The Court of Appeals' Interpretation Of The Wisconsin Statute Of Limitations Deprives The Petitioners Of A Remedy For A Wrong And Deprives Them Of Due Process Of Law.

The Court of Appeals has interpreted secs. 893.14 and 893.205, Wis. Stats. 1977, so that a cause of action for an asbestos-caused disease accrues, and the period of limitations begins to run, when the disease is first medically diagnosable. When so construed, the statutes operate to deprive

the petitioners of a remedy for a wrong guaranteed to them by article I, section 9 of the Wisconsin Constitution, and to deprive them of property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

This Court long ago held that a right of action to recover damages for an injury is property protected by the constitutional guarantee of due process. Angle v. Chicago, St. P., M. & O. R. Co., 151 U.S. 1, 19 (1893). Similarly, the Wisconsin Supreme Court has held that a cause of action is a right which is protected by both the Fourteenth Amendment to the United States Constitution and article I, section 9, of the Wisconsin Constitution, which guarantees to every person "a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property or character". Rosenthal v. Kurtz, 62 Wis.2d 1, 8, 12, 213 N.W.2d 741, 744, 746, 216 N.W.2d 252 (1974).

This Court also held long ago that a

statute of limitations deprives one of property without due process of law if, in its application to an existing right of action, it unreasonably limits the opportunity to enforce that right by suit. Wheeler v. Jackson, 137 U.S. 245, 258 (1890). Similarly, the Wisconsin Supreme Court has also held that a statute of limitations might offend both the Fourteenth Amendment to the United States Constitution and article I, section 9 of the Wisconsin Constitution if it extinguished the right of a plaintiff to sue for damages prior to the time when the plaintiff could prove the existence of an injury. Kallas Millwork Corp. v. Square D Co., 66 Wis.2d 382, 393, 225 N.W.2d 454, 460 (1975); Rosenthal v. Kurtz, supra, at 8, 12, 213 N.W.2d at 744, 746. It is the petitioners' position that the Court of Appeals' interpretation of the Wisconsin statutes deprives them of a remedy prior to the date of injury, and thus, prior to any cause of action having arisen. Therefore, such an application of

the statutes is violative of both the United States and Wisconsin Constitutions.

"A cause of action accrues where there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it." (Emphasis supplied.) Barry v. Minahan, 127 Wis. 570, 573, 107 N.W. 488, 490 (1907), quoted with approval in United States Fire Ins. Co. v. E. D. Wesley Co., 105 Wis.2d 305, 310, 316, 313 N.W.2d 833, 835, 838 (1982); Holifield v. Setco Industries, Inc., 42 Wis.2d 750, 754, 168 N.W.2d 177, 179 (1969). In order to have a tort claim capable of present enforcement, the plaintiff must have sustained damages. United States Fire Ins. Co. v. E. D. Wesley Co., supra, at 316, 313 N.W.2d at 838; Holifield v. Setco Industries, Inc., supra, at 755, 168 N.W.2d at 180. The damages must be sufficient so that the plaintiff "can come into court, plead and prove certain facts and secure the relief requested". Holifield v. Setco Industries, Inc., supra,

at 754, 168 N.W.2d at 179. Thus, a cause of action should accrue when the damages are sufficiently established, so as not to be too speculative to permit recovery.

The Court of Appeals in these cases has held that a cause of action for an asbestos-caused disease accrues at the time when the disease is first medically diagnosable. At the time the disease is first diagnosed, however, the disease may not be impairing the plaintiff's health, and the plaintiff may not be suffering from any of the disabling effects of the disease. Yet under the Court's interpretation of the Wisconsin statutes, the plaintiff would be forced to commence a personal injury action as soon as any vestigial sign is noted. At that time, the plaintiff would be forced to seek damages for all past, present and future injuries resulting from his exposure to asbestos, or risk having a claim for any of such damages barred by the statute of limitations, as occurred in these cases. The

plaintiff would have to seek damages, not only for the diagnosed physiological change in his body but for all consequences that might develop in the future, including any future disability or impairment of health resulting from the asbestosis, and separate and distinct illnesses which may result from exposure to asbestos, such as mesothelioma or other forms of cancer.

However, it is the rule in Wisconsin that in order to recover damages based on future consequences, the plaintiff must prove that such consequences are "reasonably certain" to result from the injuries sustained. Recovery of damages for "possible" or speculative future consequences is not permitted. See: Hargrove v. Peterson, 65 Wis.2d 118, 125, 221 N.W.2d 875, 879 (1974); Kincannon v. National Indemnity Co., 5 Wis.2d 231, 238, 92 N.W.2d 884, 888 (1958); Kowalke v. Farmers Mut. Automobile Ins. Co., 3 Wis.2d 389, 406, 407, 88 N.W.2d 747, 756 (1958). To meet the "reasonably certain"

standard, the plaintiff must prove by a preponderance of the evidence that the consequence will occur. Sufferling v. Heyl & Patterson, 139 Wis. 510, 518, 121 N.W. 251, 254 (1909). If the alleged future effect is so proven, the plaintiff may be awarded full compensation for it; however, if the plaintiff fails to meet his burden, his award must be limited to damages for injuries he has already sustained.

At the time that a person brings suit for diagnosed asbestosis, he may not be able to prove to a reasonable certainty that such disease will cause disability or that a more serious disease will develop later. His claim for future disability, which probably would be his main consequential damages, would be in danger of not being adjudicated. Recovery for injury he suffered would be barred for him.

On the other hand, if a plaintiff, as did the petitioners in these cases, delays commencement of his action until he is

actually suffering the disabling effects of asbestosis -- which may be several years after the disease is first medically diagnosable -- in order to have sufficient proof of damages, his case will be dismissed as untimely, as would happen in these cases.

Thus, the effect of the Court of Appeals' decision is to bar a plaintiff from recovering for asbestos-caused injuries which develop subsequent to the actual diagnosis of asbestosis. If a plaintiff brings suit within three years from the date the asbestos-caused changes appear, his claim for future disability may be dismissed for lack of proof. On the other hand, if he delays commencement of an action until he has sufficient proof of disability, which may be several years after the first changes are noted, his action will be dismissed as untimely.

A cause of action cannot accrue until "there exists a claim capable of present enforcement". Barry v. Minahan, supra, at 573, 107 N.W. at 490. However, the Court

has interpreted the Wisconsin statutes in such a manner that the period of limitations commences to run when the plaintiff's damages may be too speculative to permit recovery. Thus, the statutes, as construed by the Court, deprive the plaintiff of a remedy before he has a cause of action, in violation of article I, section 9 of the Wisconsin Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

The Court of Appeals itself stated that it "would be most unfair to hold that the period of limitations had begun running before the plaintiff can possibly prove a cause of action", Neubauer v. Owens-Corning Fiberglas Corp., 686 F.2d 570, 573 (7th Cir. 1982). The Court recognized that such a holding would run afoul of article I, section 9 of the Wisconsin Constitution. Rather, the Court stated that the limitations period does not begin to run until the plaintiff's damages are sufficiently established so that he could bring suit immediately without his

damages being too speculative. Therefore, the Court rejected Owens-Illinois' argument that a cause of action for asbestosis accrues when the plaintiff is exposed to asbestos, because the Court recognized that an asbestos-caused injury is not provable in court until some undetermined time after the plaintiff's initial exposure to asbestos.

Similarly, the disabling effects of diagnosable asbestosis may not be provable in court until some undetermined time after the disease is first diagnosable. Yet the Court held that the limitations period begins to run at the time the disease is diagnosable. The Court has in effect held that the period of limitations begins to run before a plaintiff is able to prove the future injuries which will result from his diagnosable asbestosis. The Court has held, therefore, that the period begins to run before the plaintiff's cause of action has accrued. Such an interpretation of the Wisconsin statutes deprives the petitioners of prop-

erty without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and deprives them of a remedy for a wrong guaranteed to them by article I, section 9 of the Wisconsin Constitution.

It is the position of the petitioners that an interpretation of the Wisconsin statutes which would not offend such constitutional provisions is a determination that the statute of limitations in an action for asbestos-caused disease does not begin to run until physical impairment from the disease has manifested itself. It is only at this time that the plaintiff has sufficient proof of damages so as to enable him to enforce his claim in court.

Such a view was adopted by the Court in Karjala v. Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1975), a case involving a claim for asbestosis where the appellant contended that the Court's instruction on the statute of limitations was

erroneous. Initially, the Court pointed out that the statute of limitations does not begin to run until damage has resulted:

> "...We recently examined the commencement of the statute of limitations in Minnesota and concluded that:
>
> "'[i]n Minnesota, *** the statute does not begin to run until damage has resulted. It is not necessary for the final or ultimate damages to be known or predictable, however, the statute begins to run when some damage occurs which would entitle the victim to maintain a cause of action.'" Id. at 160.

Thus, Minnesota's rule is similar to Wisconsin's in that damages are an essential element of a negligence cause of action and the cause of action cannot accrue, or the statute of limitations begin to run, until damages have been sustained.

More specifically, in commenting on the effect of the Minnesota law, the Court in Karjala stated that the statute only begins to run when there has been some harm or impairment manifesting itself:

> "Thus, under Minnesota law, an instruction on the statute of limitations

> must be couched in terms of when damage has resulted from the alleged breach of duty, that is, the time when a claim could be brought in a court of law without dismissal for failure to state a claim; in a personal injury action this occurs when some harm or impairment has manifested itself which can be shown to have been caused by an act or omission for which the defendant would be liable..." (Emphasis supplied.) Id. at 160.

The Court approved the instruction to the jury since it was in accordance with the Minnesota law stated above. The instruction charged the jury as follows:

> "Now, with regard to the statute of limitations, the law requires that Mr. Karjala bring his claim to court within six years of the date his claim arises. That is, in order to avoid stale claims, in fairness to the defendant, you shouldn't be able to have a claim and sort of lay in the weeds and wait and wait and wait and then bring it. The defendant might not have any idea what it is about at that time. But they assume that six years is a fair time to wait, and that is what they say, you can't bring it after six years.
>
> "His claim arises when the harm to his person becomes evident. However, contracting asbestosis is not a matter of moment, or an occasion, but something which develops over a

> long period of time. The statute doesn't commence to run against Mr. Karjala until he has contracted the disease of asbestosis, and the process of contracting the disease does not cease until physical impairment manifests itself.
>
> "In other words, the disease must have progressed to a stage when Mr. Karjala would have a provable legal claim for his injuries, to the point when he would have a provable claim that he could go into court and prove. Now, if you find that he could have brought a case for asbestosis during that period of time that he continued to work and could have put in a claim and would and should have known that he had a claim based on reasonable expectation and so forth, then he had to bring it within six years of 1972 - ..." (Emphasis supplied.) Id. at 159-160.

A cause of action for an asbestos-caused disease cannot accrue until "there exists a claim capable of present enforcement". Barry v. Minahan, supra, at 573, 107 N.W. at 490. A plaintiff can only enforce his claim when the damages are sufficiently established so as to permit a recovery. Only when physical impairment from the disease has manifested itself does a plaintiff have sufficient proof of damages. Therefore, it is at this time

that the cause of action should accrue. Unlike the Court of Appeals' interpretation of the Wisconsin statutes, such an interpretation would be consistent with due process and insure a plaintiff of a remedy for a wrong.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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